DEPARTMENT OF JUSTICE

Antitrust Enforcement in an Interconnected World

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It is my pleasure to be able to speak with you today to address issues of common concern relating to the enforcement of antitrust laws. I am thrilled to be with you on the eve of the Winter Olympics in PyeongChang. Beginning next week the entire world will focus its attention on South Korea, much as it did thirty years ago during the Seoul Olympics of 1988. The Seoul Olympics were for me and millions of my generation, a coming out party for South Korea. I'm confident that the same will be true next week, as hundreds of millions of people will look beyond the security threats of the Korean peninsula, and focus on the amazing culture, cuisine, and hospitality of the Land of the Morning Calm.

It is remarkable how far the world has come since the Seoul Olympics. In 1988 the two countries at the top of the leader board for Olympic medals were the Soviet Union and East Germany. No one could have guessed it, but Seoul would be their last Olympic Games, because shortly thereafter the Soviet Union dissolved and Germany reunited. In a few short decades, we have moved from a world of superpower military antagonism to a world of interconnected economic prosperity. With the end of the Cold War, most people generally have retreated from considering other countries as existential military threats. Typically, we treat our foreign counterparts as potential trading partners, or at worst as fierce economic rivals. If one had to choose to live in the world as it existed during the Seoul Olympics, or the world as it exists during the PyeongChang Olympics, regardless of where you live, I can easily hazard a guess as to which you would choose. The better angels of our nature have prevailed, and we live in the most peaceful and prosperous time in the history of humanity.[1]

Equally remarkable are the changes that have been wrought in South Korea. In 1988, South Korea had a per capita GDP of less than $5,000, and a government under military control.

[1] Steven Pinker, Enlightenment Now: The Case for Reason, Science, Humanism, and Progress (2018); Steven Pinker, The Better Angels of Our Nature: Why Violence Has Declined (2011).

The judiciary lacked independence, and direct democracy was still on the horizon. But since that time, South Korea has transformed itself into a prosperous, stable, vibrant democracy. As one scholar has noted, "the South Koreans have written the most unlikely and impressive story of nation-building of the last century."[2]

There is much to appreciate in South Korea's economic success story over the past several decades. It is a familiar story to all of you, but it is worth repeating: South Korea is one of the fastest growing and most successful economies in the world. It now has a per capita GDP of $35,000. It is one of only seven countries—including Britain, France, Germany, Italy, Japan, and the United States—in the 20/50 club of countries with over 50 million people and per capita income over $20,000. It is ranked 19th in the world on the rule of law index, which is a remarkable achievement. It would be ranked even higher but for lower marks due to corruption, and certain shortcomings on fundamental rights such as due process and non-discrimination.[3]

All of these successes exemplify three key lessons about government's role in building a strong and successful economy. First and most important is the significance of market-based legal reforms to economic growth. When faced with serious economic challenges over the past several decades, South Korea has repeatedly demonstrated the ability and perseverance to tackle market-based reforms that have paved the way for renewed growth. Second is how essential it is for governments to foster innovation. This includes creating regulatory and enforcement structures that support the market investment necessary for such innovation and working towards a stronger rule of law that offers the transparency and the predictability to encourage such investment. Third and relatedly, I see how closely intertwined the Korean success story has been with a recognition of our global connections. Today, Korean firms develop and manufacture

[2] Daniel Tudor, Korea: The Impossible Country 10 (2012).
[3] World Justice Project, Rule of Law Index, 128 (2016).

technologies that are part of the daily lives of people around the world, and those technologies—from smart phones to LCD TVs to mobile broadband—are among the means by which the global economy becomes even more interconnected. Many of you here today have been a part of this market success.

All three of these principles—a commitment to rule of law, support for innovation, and recognition of our global connections—are key pillars of sound antitrust law, the area where I now focus my efforts as a Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice. Since joining the Department of Justice last summer, I have spoken repeatedly about the importance of rule of law in antitrust enforcement.[4] In the past few months, I have traveled from Asia to South America to Europe on a listening tour, gaining insights on the amazing complexity of the competition landscape. I have come away from those meetings impressed at how well agencies are conducting themselves, often with finite resources, limited experience, and intense political oversight. But I also have come away with concerns about some of the hurdles that continue to undermine agency effectiveness in certain countries. I have engaged in productive discussions with our counterparts around the world regarding effective, transparent and non-discriminatory enforcement of the antitrust laws. The effort to champion rule of law in antitrust enforcement is a cornerstone of the Department of Justice's work internationally, and we continue to work on new ways to advance this message around the world.

Ensuring that antitrust enforcement supports innovation is equally a priority, and it is no coincidence that this was the subject of one of the first public speeches by the Antitrust Division's Assistant Attorney General, Makan Delrahim. In his remarks this past October at

[4] Remarks of Deputy Assistant Attorney General Roger Alford at the China Competition Policy Forum (August 30, 2017), *available at* https://www.justice.gov/opa/speech/file/994671/download; Remarks of Deputy Assistant Attorney General Roger Alford at the Conference on Rule of Law and Anti-Corruption Challenges (October 3, 2017), *available at* https://www.justice.gov/opa/speech/file/1001076/download.

New York University, AAG Delrahim announced his commitment to work together on a mutual consensus toward non-discriminatory enforcement of antitrust laws worldwide.[5] This past November, he reaffirmed the Antitrust Division's commitment to enforcement principles that reward and foster innovation. He spoke forcefully about ways in which the DOJ's Antitrust Division works to ensure a proper balancing of intellectual property and antitrust law.[6] His focus in this area continues the long-standing view of the Antitrust Division that the intellectual property laws create vital incentives for innovation and commercialization, and reflects his deep commitment to innovation policy in the U.S. and abroad.

Today, I would like to speak at more length about the third principle—recognizing the global impact of antitrust enforcement. Just as Korea and the world have fundamentally changed since the 1988 Seoul Olympics, so too has global antitrust enforcement. In 1988 there was no International Competition Network, and only a handful of competition agencies were active, as much of the world continued to embrace highly-regulated or command economies. As President Ronald Reagan put it, the attitude of governments at the time was "if it moves, tax it, if it keeps moving, regulate it, and if it stops moving, subsidize it."[7] But as companies competed on an ever more global scale, countries became ever more committed to market-based economies and to enforcing competition laws. Today there are more than 130 different jurisdictions with antitrust agencies. A merger of two multinational firms can trigger merger filings and reviews in a dozen or more jurisdictions. Cartels affecting the global supply chain may involve companies engaged in illegal activity in countries separated by thousands of miles, numerous time zones, and

[5] Remarks of Assistant Attorney General Makan Delrahim at New York University School of Law (October 27, 2017), *available at* https://www.justice.gov/opa/speech/file/1007231/download.
[6] Remarks of Assistant Attorney General Makan Delrahim at the University of Southern California Law School (November 10, 2017), *available at* https://www.justice.gov/opa/speech/file/1010746/download.
[7] Michael Reagan, *In the Words of Ronald Reagan, The Wit, Wisdom, and Eternal Optimism of America's 40th President*, 111 (2008).

multiple languages. Unilateral conduct enforcement in one jurisdiction has the potential to affect marketing and licensing practices not just in that jurisdiction, but around the world.

For antitrust enforcers, this means that international coordination and cooperation are more important than ever. Without these tools, the uncertainty associated with divergent approaches to enforcement has potentially significant costs for globally active companies, and the risks of inconsistent and potentially conflicting remedies are high. Antitrust enforcers who do not consider the global impact of their enforcement decisions can create inefficiencies that ultimately harm consumers throughout our interconnected world.

The increasingly international scope of antitrust enforcement is one reason that the Department of Justice, together with the U.S. Federal Trade Commission, updated and reissued the Antitrust Guidelines for International Enforcement and Cooperation last year.[8] Among the issues that these Guidelines address is our application of U.S antitrust law to conduct outside the United States, and the factors that we consider in applying our laws to that conduct. Namely, before pursuing an enforcement action or seeking a remedy that might have impacts outside the United States, the Department of Justice considers whether the U.S. antitrust laws apply to the conduct and whether there are comity considerations that should be taken into account.

As the Guidelines note and as the U.S. Supreme Court made clear,[9] the U.S. antitrust laws apply to conduct outside the United States that has a substantial and intended effect in the U.S. This application was reaffirmed when U.S. Congress passed the FTAIA, amending the Sherman Act, in 1982.[10] The ability to apply the U.S. antitrust laws in this way has been a key

[8] *See* U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (2017) (hereinafter "INTERNATIONAL GUIDELINES"), *available at* https://www.justice.gov/atr/internationalguidelines/download.
[9] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).
[10] 15 U.S. C. § 6a.

part of our efforts to effectively address international cartels whose illegal activities raise prices and cause economic harm to U.S. commerce and consumers.

It is also clear that where necessary to address U.S. harm, the U.S. antitrust agencies can impose remedies that go beyond U.S. borders. But, when the Antitrust Division considers an extraterritorial remedy, it does not do so lightly. The Antitrust Division will look carefully at several issues. First, is the remedy necessary to redress harm or threatened harm to U.S. commerce and customers? Second, is the remedy we seek consistent with a comity analysis?

The first inquiry is highly fact intensive and can only be answered after a thorough investigation as to the harm to U.S. commerce. As the Antitrust Division has noted in its Policy Guide to Merger Remedies, the remedy should fit the violation and flow from the theory of competitive harm. Moreover, relief is most likely to effectively protect consumers when it is based on a careful application of economic and legal analysis to the particular facts of the case.[11]

Numerous cases in which U.S. antitrust enforcers have gone beyond our borders illustrate this principle. For example, an appellate court found in a recent case that foreign divestiture of a manufacturing plant in Austria was needed to restore competition in the U.S. market.[12] The same was true in the recent review of mergers in the beer industry, where the Division required, and the court approved, the divestiture of a brewery in Mexico to help maintain competition in the U.S. market.[13]

Linking the remedy to the harm is only part of our analysis. We also consider comity, and the comity analysis requires answers to a host of different questions. These are described in

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[11] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2011), *available at* https://www.justice.gov/atr/merger-enforcement.
[12] Polypore Int'l v. FTC, 686 F.3d 1208, 1219 (11th Cir. 2012).
[13] *See* U.S. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., Final Judgment, filed Oct. 21, 2013, available at https://www.justice.gov/atr/case-document/final-judgment-15.

detail in our Antitrust Guidelines for International Enforcement and Cooperation.[14] The most obvious comity question is whether the proposed remedy creates a direct conflict of laws, what the Supreme Court has called a "true conflict."[15] If a remedy would put a person in the position of being unable to comply with the laws of another sovereign to which that person is subject, then comity may counsel against enforcement, or in favor of an alternative remedy.[16]

But the comity analysis does not end there. The Supreme Court has embraced a broader international comity analysis in the antitrust context,[17] and consistent with that position, the Antitrust Division assesses, among other things, the "articulated interests and policies of a foreign sovereign."[18] Among the questions the Antitrust Division will ask as part of its comity analysis is whether a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct. In other words, comity requires an analysis of the policies of other jurisdictions that consider the behavior procompetitive.

By reaching out to foreign authorities we can secure a better understanding of how to fashion a remedy that addresses the harm to our market and the relevant foreign policy concerns of other jurisdictions.[19] To reiterate, the Antitrust Division will only seek a remedy that includes conduct or assets outside the United States if it is needed to redress harm to the United States *and* is consistent with our international comity concerns. And those comity concerns are broader than the "true conflict" scenario.[20] In conducting its comity analysis, the Division considers, among other things, the degree of conflict with a foreign jurisdiction's law or articulated policy

[14] INTERNATIONAL GUIDELINES at 27-29.
[15] *Hartford Fire Ins. Co. v. California,* 509 U.S. at 798.
[16] INTERNATIONAL GUIDELINES at 29.
[17] *F. Hoffmann-La Roche Ltd. V. Empagran, S.A.,* 542 U.S. 155, 173-175 (2004).
[18] *Ibid.*
[19] *Id.*
[20] *Id.* at 47.

and the extent to which enforcement activities of another jurisdiction—including remedies resulting from those enforcement actions—may be affected. We have articulated these principles not only in our Guidelines, but in cooperation agreements with our counterpart enforcers as well. As our 2015 cooperation agreement with the Korean Fair Trade Commission states, we must give "careful consideration to the enforcement objectives and important interests of the other country's competition authority … in conducting [our] enforcement activities.[21]

In a world of concurrent authority, it behooves us to recognize that conduct we condemn abroad may affect international commerce and impact the power of other nations to grant rights to their subjects and regulate conduct within the scope of their authority. These principles of international comity are as old as the nation state. Writing in 1689, just a few decades after the Peace of Westphalia, Ulrich Huber stated that "nothing could be more inconvenient to commerce … than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law."[22] Of course there are limits to the exercise of power abroad, for each nation has the authority to bind "within the limits of that government and … all [those] subject to it, but not beyond."[23] But in the interest of international commerce, Huber wrote, each nation shall enforce the laws of one another insofar "as they do not cause prejudice to the power or rights of such government or of its subjects."[24] Under this understanding of

[21] Memorandum of Understanding on Antitrust Cooperation Between The United States Department of Justice and the United States Federal Trade Commission, of the one part, and The Korea Fair Trade Commission, of the other part, September 8, 2015 (hereinafter "DOJ-KFTC MOU"), *available at* https://www.justice.gov/atr/file/768371/download.
[22] Ulrich Huber, De Conflictu Legum Diversarum in Diversis Imperiis (Ernst G. Lorenzen trans. 1919) (1689), reprinted in Ernst G. Lorenzen, Selected Articles on the Conflict of Laws, 165 (1947); William S. Dodge, *International Comity in American Law,* 115 Colum. L. Rev. 2071, 2085-86, 2096 (2015); Donald Earl Childress, III, 44 UC Davis L. Rev. 11, 19-22 (2010).
[23] Huber, at 164.
[24] *Id.*

comity, this means that "the effects of competent foreign laws are everywhere admitted, except when prejudicial to the forum State or its citizens."[25]

We of course have moved beyond the world of strict territorial sovereignty, as evident by the effects doctrine and similar exceptions that we apply in the antitrust and other contexts. Nonetheless, it remains true that comity counsels governments to respect the needs of international commerce and be sensitive to the interests of other sovereigns, including the rights sovereigns grant to those subject to their authority.

This question of international comity is particularly critical with respect to the choice of remedies. What if the comity analysis shows that the proposed remedy implicates the interests of a foreign sovereign? It has been the longstanding practice of the Antitrust Division to adopt remedies that avoid unnecessary conflicts with the remedies of other jurisdictions. A key focus of the frequent and strong international cooperation the Division has engaged in over the years in merger reviews has been to forestall such potentially conflicting remedies. Beyond the immediate issue of whether an antitrust remedy conflicts with one imposed by another jurisdiction, the Antitrust Division will work collaboratively where possible with other jurisdictions to minimize comity concerns while still ensuring that the remedy fulfills its purpose of addressing the harm or threatened harm to U.S. commerce and consumers.

The considerations I describe with respect to extraterritorial antitrust remedies implicate not only the principle that sound antitrust enforcement must take into account its global impact, but also the other two principles of antitrust enforcement with which I began this talk—

[25] Hessel E. Yntema, *The Comity Doctrine,* 65 Mich. L. Rev. 9, 30 (1966) (summarizing Huber's understanding of comity). Since Huber's time, of course, there have been numerous other formulations of international comity, with different justifications and varying degrees of receptivity in the United States and elsewhere.

enforcement based on a transparent, non-discriminatory rule of law, and enforcement that fosters innovation and the investment that innovation requires.

I have spoken before at length about the importance of transparency for creating the stability and predictability in enforcement that allows business to prosper and for enhancing confidence that antitrust enforcers are making reasoned, non-discriminatory enforcement decisions.[26] In the context of remedies that stretch across borders, this transparency demands that before imposing a remedy, an antitrust enforcer clearly articulate the harm to its commerce and consumers and describe how the proposed remedy is necessary to address that harm. Where the remedy involves an extraterritorial component, this kind of transparency is necessary not only for all the usual reasons but also because it allows for productive engagement with other jurisdictions whose comity interests may be implicated. Before imposing a global remedy to address local harm, an agency should be transparent as to why that remedy is narrowly tailored to achieve the desired ends. Without such transparency, some will assume the worst and leap to the conclusion that the remedy is designed to serve other, improper objectives.

Taking extraterritorial impact into account with respect to remedies also has a clear connection to the goal of fostering innovation. Where remedies involve the terms on which intellectual property is licensed, it is particularly likely that extraterritoriality will be an issue. Internationally active firms may prefer and may even need global licensing terms for intellectual property. Goods subject to these licenses may flow through multiple jurisdictions and multiple levels of the supply chain before they reach the end user, and it may be impractical to track at a granular level whether a good licensed for a particular jurisdiction ends up in that jurisdiction and not in some other one. Moreover, the intellectual property laws of a particular jurisdiction

[26] Alford Remarks, China Competition Policy Forum (August 30, 2017).

may be, as they are in the United States, a clearly articulated policy to support innovation by permitting a patent holder to extract the full value of the patent holder's rights. As a result, an antitrust remedy that impacts the protections another jurisdiction offers under its intellectual property laws is one is which comity concerns may well arise.

In sum, in order for antitrust enforcement to respond to an increasingly interconnected world of concurrent authority, antitrust enforcers cannot simply ignore the impact their remedies may have on other jurisdictions. It is not enough to engage in case cooperation with other jurisdictions that are pursuing an investigation of the same matter. Nor is it enough to ask whether the parties are between a rock and a hard place, unable to comply with competing commands. Comity also requires a degree of policy cooperation as to the interests of other affected jurisdictions. How else can one assess the articulated interests and policies of a foreign sovereign? In the specific context of the U.S.-Korea relationship, that means abiding by our commitment from 2015 to regularly consult with one another and keep each other informed of significant enforcement developments and policy changes.[27]

A commitment to transparency and cross-border cooperation on the part of all antitrust enforcers is necessary to ensure that we avoid the risks and the inefficiencies of conflicting remedies and the harm these may have on the very consumers we seek to benefit. In particular, we need frank and open discussions among antitrust enforcers around the world about the role of comity in extraterritorial remedies that go beyond a simple conflict of rules analysis. Only then can we ensure that we are best protecting competition and consumers in all of our jurisdictions.

I am delighted to be with you at this time and I greatly appreciate the hospitality of the Commissioners of the Korean Fair Trade Commission at this busy time of year. In celebration of

[27] DOJ-KFTC MOU.

the upcoming Winter Olympics, let me close with an Olympic analogy. If one were to compare international antitrust enforcement to one of the winter sports that will be on display next week, which one would you choose? In my office, some suggested bobsledding because of the teamwork required. Others suggested figure skating because skaters are required to perfect core technical elements and present their routines with finesse and grace. For me, I can say with confidence that it would *not* be downhill skiing, where a skier is alone on the mountain, racing down the hill in blissful ignorance of everyone around her, laser focused on reaching the finish line. I think the best analogy is ice hockey, in which almost everyone is trying to play by the rules, but there are some unscrupulous players who frequently come to blows, attempting to hide their charging and checking from millions of watchful eyes. In hockey, the best players have incredible situational awareness, acutely conscious of the surrounding environment and the likely intentions of everyone around them. "Eyes in the back of the head" is the common term for it. In the context of antitrust enforcement, international comity provides antitrust enforcers with that situational awareness and spatial intelligence, permitting us to maneuver in ways that are sensitive to the surrounding context and the likely intentions of the other players in the game.

Thank you.